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**U.S. Department of Homeland Security**

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*
*CIS, AAO, 20 Mass, 3/F*
*425 I Street, N.W.*
*Washington, D.C. 20536*

B6

[redacted]

File: WAC 01 278 50337 Office: California Service Center Date: JAN 27 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn, and the petition will be remanded for further action and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary had the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* -- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on February 24, 2000, indicates that the minimum requirement to perform the job duties of the proffered position of specialty cook is three years of experience.

The petitioner submitted a letter of experience from Rita Peckler of The Peckler Group which stated that:

> Please be advised that the company controlled and owned by me for the period of seven years has employed Jose Angel Badillo. His primary specialty has been Italian kitchen food preparation and management. All of the aspects of the Italian cousin [sic] has [sic] been either prepared or controlled by this wonderful ex-employee.
>
> The period of work that is being confirmed by this letter is from 1993 to 1999.

Although, in a request for evidence, dated June 14, 2000, the director asked for evidence relating to the beneficiary's ability to pay the proffered wage, he made no mention of the evidence presented to establish the beneficiary's qualifications.

In his decision of September 18, 2002, denying the petition, the director concluded that the evidence submitted was insufficient to establish the requisite experience of three years and denied the petition accordingly. The director noted that the ETA-750 listed The Gourmet Pasta & Pizza Company as the beneficiary's employer from August 1993 to May 1999. The director further noted that:

> On September 3, 2002, the "Peckler Group" was contacted at the same telephone number as it appears on the "Peckler Group's" letterhead. This writer was informed by Ida Raybits, bookkeeper, 1) that Rita Peckler is deceased, 2) that the company name has changed, but not the location, 3) that the company is in the business of providing business services, such as bookkeeping and payroll, and 4) that the company is located in a small suite of offices, and has never been a restaurant.

The first paragraph of the director's decision includes this sentence: "The Service intends to deny the above petition."

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

> *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or

> petitioner and is based on derogatory information considered by the Service [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact, and offered the opportunity to rebut the information in his/her own behalf before the decision is rendered,...

In this case, the director did not follow the regulation, and allow the petitioner to respond to the adverse information. The director's decision begins as if it is going to be a notice of intent to deny, and ends up being a denial.

On appeal, counsel submits documentation which probably would have been submitted in response to a notice of intent to deny. The petition is remanded to the director for him to follow proper procedure in accordance with the above regulation. The director is to issue a notice of intent to deny; he is to allow the petitioner to submit any additional documentation not already submitted; and he is directed to enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.